LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
APR 5 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 954

ERWIN H. EZZES,

Petitioner,

—against—

SOL A. DANN, et al. and MARY L. GALLO, et al.,
Respondents, Plaintiffs below,

and

CHRYSLER CORPORATION, et al.
and PAUL C. ACKERMAN, et al.,
Respondents, Defendants below,

and

HERMAN KOENIGSBERG and VIRGINIA S. JUDSON, et al.,
Respondents, Objectors below,

and

ARTHUR HOFFMAN,
Petitioner (No. 893, Oct. Term 1964),
Objector below.

BRIEF OF RESPONDENTS KARL S. HORVATH, JULIUS R. REIVER, IONA P. REIVER, ANN GELBARD AND ROBERT MARKEWICH, IN OPPOSITION

LEWIS M. DABNEY, JR.
37 Wall Street
New York 5, New York

HERBERT ROBINSON
32 East 57th Street
New York 22, New York

SAMUEL BECK
51 Chambers Street
New York 7, New York

DANIEL O. HASTINGS
CLARENCE W. TAYLOR
RUSSELL J. WILLARD
108 Continental American Bldg.
Wilmington 99, Delaware

Counsel for above named Respondents

INDEX

	PAGE
Opinions Below	2
Question Presented	2
Statement of Case	2
Argument	6
Conclusion	7
Appendix—Page 5 of Petitioner's Reply Brief in the Supreme Court of Delaware	9

TABLE OF CASES CITED

Bailey v. *Anderson, State Highway Commissioner*, 326 U.S. 203	2
Cohen v. *Young*, 6 Cir., 127 F. 2d 721	3
Columbian Fuel Corporation v. *Superior Court*, 158 Atl. 2d 478 (Del. Sup. Ct.), affd. 366 U.S. 656	6
Pan American Petroleum Corporation v. *Superior Court*, 366 U.S. 656	2, 6, 7
Parker v. *Illinois*, 333 U.S. 571	2, 6
Radio Station WOW Inc. v. *Johnson*, 326 U.S. 120	2, 6

OTHER AUTHORITIES CITED

Securities and Exchange Act:	
Rule 14 A-9	6
Section 14(a)	2, 4, 5
Rules of Supreme Court of United States, Rule 23 (f)	2
28 USC Section 1257 (3)	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 954

ERWIN H. EZZES,

Petitioner,

—against—

SOL A. DANN, et al. and MARY L. GALLO, et al.,
Respondents, Plaintiffs below,

and

CHRYSLER CORPORATION, et al.
and PAUL C. ACKERMAN, et al.,
Respondents, Defendants below,

and

HERMAN KOENIGSBERG and VIRGINIA S. JUDSON, et al.,
Respondents, Objectors below,

and

ARTHUR HOFFMAN,
Petitioner (No. 893, Oct. Term 1964),
Objector below.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF DELAWARE

BRIEF OF RESPONDENTS KARL S. HORVATH, JULIUS R. REIVER, IONA P. REIVER, ANN GELBARD AND ROBERT MARKEWICH, IN OPPOSITION

This brief is in opposition only to the Petition filed on behalf of Erwin H. Ezzes and not with reference to any other petitions filed herein.

Opinions Below

The opinion of the Supreme Court of Delaware is reported as *Hoffman* vs. *Dann*, 205 A 2d 343 (1964). The opinion of the Court of Chancery of Delaware is reported as *Dann* vs. *Chrysler Corporation*, 198 A 2d 185 (1963).

Question Presented

Petitioner asserts that his petition presents the following question: Must a state court in passing upon the settlement of a stockholders' derivative suit which is governed primarily by state decisional law —common law and equity—give predominant weight under the supremacy clause to alleged violations of the proxy rules adopted by the Securities and Exchange Commission pursuant to Section 14(a) of the Securities Exchange Act.

Petitioner's difficulty is that his question was neither presented nor decided below; hence it cannot be here reviewed. *Radio Station WOW Inc.* v. *Johnson*, 326 U.S. 120, 128; *Bailey* v. *Anderson*, State Highway Commissioner, 326 U.S. 203; *Parker* v. *Illinois*, 333 U.S. 571; *Pan American Petroleum Corporation* v. *Superior Court*, 366 U.S. 656, 666.

Statement of Case

Petitioner does not attempt to comply with Rule 23 (f) of this Court which requires a detailed statement, supported by record references, showing at what stage of the proceeding he raised the federal ques-

tion, the method of raising it, and how the state court disposed of the question. He does not make this showing because none of these things happened.

The question of fraud in a proxy statement (whether under state or federal standards) was involved only tangentially in this case and arose as follows:

Plaintiffs in two stockholders' derivative suits pending in the Chancery Court of Delaware agreed with defendants to settle these suits. The considerations for the settlement, were the amendment of the Chrysler Incentive Compensation Plan so that a lesser bonus would be paid to Chrysler executives for inferior, and a greater bonus for superior, corporate earnings, and the recoveries and changes in management in Chrysler and other benefits which followed commencement of the litigation. Pursuant to the settlement agreement, the proposed amendment of the Plan was submitted to the stockholders together with a court-approved notice of the settlement which told the stockholders that a vote for the amendment was, in effect, a vote for the settlement. The stockholders approved the amendment by a vote of 6,699,016 to 144,240. (Appendix to Defendants' Brief in Opposition to the Petition of Arthur Hoffman, No. 893, p. 63.)

The court-approved notice required any stockholder objecting to the settlement to file a statement of his grounds of objection (Id. p. 16). Under such a notice the objecting stockholder becomes a defendant in the proceeding for settlement (*Cohen* v. *Young*, 6 Cir., 127 F. 2d. 721, 724) and is entitled, as such, to raise any defense, state or federal. Several objectors appeared, including Petitioner. Petitioner charged that

the proxy statement soliciting ratification of the change in the Incentive Plan was "tainted with fraud" because it did not adequately disclose "the nature of the claims and the effect of the proposed settlement" (Id. p. 69). In making this charge Petitioner relied wholly on state law; there was no mention of Sec. 14 (a) of the Securities Exchange Act. The Chancellor found the settlement fair and beneficial to Chrysler and that there was "no merit" to the charges of fraud in the proxy statement (Id. p. 69); and he approved the settlement with one proviso which was based on the objection of objecting stockholders other than Petitioner.

Such objectors had shown that due to extraordinarily good earnings in the year 1963, which were anticipated by the directors, payment of incentive compensation under the new Plan would exceed payment under the old Plan; and the Chancellor held that defendant directors should not be permitted to vote themselves increased compensation even though the Plan, as a whole, was beneficial to Chrysler (Id. p. 99). Accordingly approval of the Plan was conditioned on excluding these defendant directors from any increased compensation in 1963 "solely as the result of the settlement". (Id. p. 99). The condition was accepted and embodied in the final order. Petitioner and others filed a motion for rehearing in which they urged exclusion of all beneficiaries of the Plan from increased compensation for 1963, which was denied (Id. pp. 102-5). In this petition, as heretofore, no mention was made of Section 14(a).

On appeal Petitioner argued that stockholder approval of the change in incentive compensation was

invalid because the proxy statement did not disclose "the future profit potentials of Chrysler and the resulting possibility of greatly increased incentive compensation under the Amended Plan." The Supreme Court of Delaware rejected this argument as follows (Pet. p. 24.):

> "It appears, however, that these matters were largely disclosed to the stockholders in the Annual Report for 1962 which was sent to them at or prior to the starting of solicitation of proxies. Indeed it would seem as though a large part of the information Ezzes says was withheld was a matter of general public knowledge.
>
> "In any event, we are satisfied that the stockholders were fully informed and acted in the light of that information except, possibly, with respect to the charge that the directors knew that the new Plan would produce substantially greater compensation for 1963 than the old Plan. The Chancellor, however, imposed as a condition upon the approval of the settlement the requirement that no director-defendant shall receive greater benefits under the Plan in 1963. We think this condition adequately takes care of Ezzes' objection."

Obviously the above decision is based on state principles of equity as expounded by the Delaware courts. The state court did not decide any question of federal law, or that federal law was inapplicable, because no such question was presented.

Petitioner mentioned Section 14(a) of the Securities Exchange Act only once—in his reply brief in the

Supreme Court of Delaware—where he argued that under Delaware law all material information had to be included in the proxy statement itself, citing two Delaware, and one New York, cases and citing only argumentatively Rule 14 A-9 under the Securities Exchange Act. This passing reference did not invoke federal law under the supremacy clause, or otherwise, but constituted merely a supporting argument as to what state law should be. (Appendix p. 9) The Delaware Supreme Court dealt with this point and rejected it as shown by the above quotation. Clearly, they did not consider that petitioner had invoked federal law. If petitioner thought that the Court had missed his point, he could have so stated in a motion for rehearing. He filed no such motion.

ARGUMENT

1. 28 USC Sec. 1257 (3) requires that a defense based on federal law be raised in the state court at the point required by state procedure. *Radio Station WOW Inc.* v. *Johnson,* 326 U.S. 120, 128; *Parker* v. *Illinois,* 333 U.S. 571. Cf. *Pan American Petroleum Corporation* v. *Superior Court,* 366 U.S. 656. Petitioner did not raise the federal question at any point.

2. The state court decided the case on state law because it was not asked to do anything else. If the Delaware court had entertained a request to consider applicable federal law (*Columbian Fuel Corporation* v. *Superior Court,* 158 Atl. 2d, 478 (Del. Sup Ct.), affd. 366 U.S. 656), the result would have been the same. The decision was basically factual; and to the extent that legal standards were involved any stand-

ards imposed by "federal common law" respecting omissions in a proxy statement are no more stringent than the high standards imposed by Delaware courts upon corporate fiduciaries. If Petitioner thought these standards were different he should have invoked the allegedly higher federal standard. Having failed to do so, the Delaware court was free to apply its own standard; and Petitioner cannot now seek review, in this court, as to whether there are different, and controlling federal standards. *Pan American Petroleum Corporation* v. *Superior Court*, 366 U.S. 656, 666.

CONCLUSION

For reasons herein set forth the petition should be denied.

Respectfully submitted,

LEWIS M. DABNEY, JR.
37 Wall Street
New York 5, New York

HERBERT ROBINSON
32 East 57th Street
New York 22, New York

SAMUEL BECK
51 Chambers Street
New York 7, New York

DANIEL O. HASTINGS
CLARENCE W. TAYLOR
RUSSELL J. WILLARD
108 Continental American Bldg.
Wilmington 99, Delaware

Counsel for above named Respondents

APPENDIX

Page 5 of Petitioner's Reply Brief in the Supreme Court of Delaware

Failure to reveal the information to the stockholders either in the Proxy or the Notice of Settlement Hearings, is not excused by the argument that the stockholders previously had, or should have had, the information. They were entitled to have it in connection with the Proxy solicitation and Notice of Settlement Hearings. Only by being given the information in connection therewith, and in the context of a proxy solicitation, could the stockholders give an enlightened judgment on whether to give the directors the solicited proxy and whether to approve the proposed settlement.

Kerbs and *Lieferant*, cited on pages 17 to 18 of our main brief, require the information to be contained *in the proxy statement*. The Regulations of the Securities and Exchange Commission, forbid the solicitation of proxies by means of any proxy statement which omits to set forth a material fact *in the proxy statement*.

Reg. X 14 a-9, 17 CFR 240.14a-9.*

The burden of revealing material information is on directors soliciting proxies, and this burden cannot be thrust upon the stockholders.

Empire So. Gas Co. v. *Gray*, 29 Del. Ch. 95, 46 A. 2d 741 (1946).

---

* Reg. X 14 a-9 promulgated pursuant to Sec. 14a of the Securities Act of 1934 reads as follows:

"No solicitation subject to Secs. 240.14a-1 to 240.14a-10 shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading."